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No. 88-1781

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE ALGOMA STEEL CORPORATION, LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the United States International Trade Commission erred in finding that a certain class of steel products from Canada—which the Department of Commerce had found were sold in the United States at less than fair value—materially injured a domestic industry.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 865 F.2d. 240. The opinion of the Court of International Trade (Pet. App. 8a-19a) is reported at 688 F. Supp. 639.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. The Chief Justice extended the time to file a petition for a writ of certiorari to May 4, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Title VII of the Tariff Act of 1930, 19 U.S.C. 1671 *et seq.*, the government must impose duties on imports—so-called antidumping duties—when (1) the Department of Commerce finds that a certain class or kind of foreign merchandise is being sold in the United States at less than its fair value, and (2) the United States International Trade Commission finds that an industry in the United States is being materially injured by those imports. 19 U.S.C. 1673 (1982 & Supp. V 1987). On July 22, 1985, respondents Lone Star Steel Company and CF&I Steel Corporation filed with the Commission and the Department of Commerce petitions alleging that an industry in the United States was being injured by imports of oil country tubular goods (OCTG) from Canada. 51 Fed. Reg. 15,030 (1986). They alleged that such goods, which are hollow steel products used to drill into the ground, were being sold in the United States at less than fair value.[1]

The Department of Commerce investigated the allegation. On April 22, 1986, the Department published its finding that "oil country tubular goods (OCTG) from Canada are being, or are likely to be, sold in the United States at less than fair value." 51 Fed. Reg. 15,029 (1986). The Commerce Department excluded the goods of Welded Tube of Canada, Ltd. from its finding because Welded Tube did not have any sales in the United States at less than fair value. *Ibid.*

The United States International Trade Commission then determined that an industry in the United States was materially injured by the class of imports found by the Commerce Department to be sold at less than fair value

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[1] In general, an imported good is sold at less than fair value under the Tariff Act if the same good costs more in the importer's home country. See 51 Fed. Reg. 15,030 (1986).

(Pet. App. 20a-31a). In making that finding, the Commission considered the effect on the domestic industry of all imports of OCTG from Canada except those goods made by Welded Tube, which the Department of Commerce had found did not sell at less than fair value (*ibid.*).

2. Petitioner, a Canadian manufacturer of OCTG, sought judicial review of the Commission's decision in the Court of International Trade. Petitioner argued, among other things, that the Commission erred in considering the effect of the class of goods that the Department of Commerce had found were being sold at less than fair value—*i.e.*, OCTG from Canada (but not Welded Tube's goods). Petitioner asserted that it, as well as other Canadian exporters, sold some of its goods in the United States at fair value. Petitioner contended that such goods sold at fair value should have been excluded from the Commission's injury analysis.

The Court of International Trade upheld the Commission's decision (Pet. App. 8a-19a). The court ruled that the Commission did not violate the statute by considering all imports into the United States of OCTG by Canadian firms that were found by the Department of Commerce to have sold a significant percentage of their goods at less than fair value. Moreover, the court noted that this "is not a case of few LTFV [less than fair value] sales but of LTFV sales as a substantial percentage of all sales" (*id.* at 18a).

The court of appeals affirmed. It held that, under the statute, "the terms of any individual sale do not matter" (Pet. App. 3a). Rather, the court ruled, the statute is concerned with injuries to domestic industries that result from the importation of "a 'class or kind' of * * * merchandise [that] is sometimes sold at LTFV" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus no further review is warranted.

Petitioner renews its argument (Pet. 13-26) that the Commission erred in considering the effect on domestic industry of all OCTG imported into the United States by Canadian firms that have sold a substantial percentage of such goods at less than fair value. That claim is inconsistent with the language of the Tariff Act and the longstanding interpretation and practice of the Commission and the Department of Commerce.

1. Section 731 of the Tariff Act (19 U.S.C. 1673 (1982 & Supp. V 1987)) sets forth the rules governing whether an antidumping duty will be imposed. It provides:

> If—
>
> (1) the administering authority [*i.e.*, Department of Commerce] determines that a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty * * *.

Accordingly, Section 731 directs the Commerce Department to consider whether "a class or kind of merchandise is being" unfairly imported. Thus, contrary to petitioner's suggestion (Pet. 16-17), the Department of Commerce is not required to determine whether each and every sale within that class was at less than fair value. And the Commission is directed by Section 731 to consider the effect on domestic industry of the same merchandise that was the focus of the Department of Commerce's finding—*i.e.*, the "class or kind of merchandise" that was found to be imported at less than fair value.

Here, the Commerce Department found that goods in a particular class—OCTG from Canada (excluding the imports of Welded Tube)—were being sold in the United States at less than fair value. The Commission, following the command of Section 731, examined those imports of OCTG from Canada and found that they had materially injured a domestic industry. Accordingly, the Commission's action followed from the plain meaning of the statute.[2]

2. Contrary to petitioner's claim (Pet. 17-24), the legislative history of Section 731 does not require the Court to disregard the natural meaning of the statute. Section 731 was added to the Tariff Act by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 162. Nothing in the history of that Act suggests that the Department of Commerce must identify individual sales at less than fair value and that the Commission is limited to examining only the injury caused by such sales. The Senate

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[2] Petitioner relies on Section 735 of the Tariff Act (19 U.S.C. 1673d (1982 & Supp. V 1987)). That section governs the procedure for investigating complaints and reaching a final decision. It does not modify the authorization in Section 731 to make class-wide decisions regarding whether merchandise is being unfairly imported.

Report accompanying the 1979 legislation states that duties will be imposed when "an industry [is] materially injured 'by reason of' less-than-fair-value imports." S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979). It then specifies that the Commission must "consider the volume of imports of merchandise with respect to which the administering authority has made an affirmative final determination on * * * less-than-fair-value sales." *Id.* at 86. Thus, the Senate Report simply reiterates the scheme established by the statute; the Department of Commerce must find that goods are being unfairly imported and the Commission must find that those imports are harming a domestic industry. The Senate Report, however, suggests no reason to adopt an unnatural meaning for the phrase "a class or kind of [foreign] merchandise" in Section 731. Hence, there is no basis for concluding that Congress intended to require the Department of Commerce (and consequently the Commission) to make findings with respect to each and every import transaction.

In addition, the Commission's interpretation of the statute is consistent with the general structure of the Tariff Act. Under the statute, an order imposing an antidumping duty applies to all imports within the class found by the Department of Commerce to be unfairly imported. 19 U.S.C. 1673e(a). Accordingly, the Commission properly considers the effect of all imports within that class—*i.e.*, all merchandise of the type potentially subject to antidumping duties.

To be sure, members of Congress cautioned the Commission not to consider the adverse effects of fairly traded imports. See, *e.g.*, H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979). But that observation says nothing about which imports are fairly traded or whether the government may focus on a class of unfairly imported goods. The Department of Commerce, following its rea-

sonable reading of the Tariff Act, determined that OCTG from Canada were not being fairly traded. The Commission then found that such merchandise adversely affected a domestic industry. Thus, the Commission acted in accordance with congressional intent and considered only the adverse effect of a class of unfairly imported goods.

Moreover, the Commission has consistently held its view of the statute since the passage of the Trade Agreements Act in 1979. See, *e.g.*, *Strontium Nitrate from Italy*, Inv. No. 731-TA-33 (Final), USITC Pub. 1155 (June 1981). The Commission's consistent and longstanding interpretation of the statute that it enforces is entitled to substantial deference. See *United States* v. *Clark*, 454 U.S. 555 (1982). This is particularly true in light of the fact that the Commission's practice has been brought to the attention of Congress. See *Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 1178-1179 (1983). Congress has not altered the Commission's practice even though it has since twice amended other aspects of the statute. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1324(b)(3), 102 Stat. 1201; Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 612(a)(2)(A), 98 Stat. 3033.

3. Petitioner next argues (Pet. 21-24) that the Commission's reading of the Tariff Act runs afoul of an international trade agreement – the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT), Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650. Even if there were a conflict between the Act and the agreement, however, the statute would prevail. See 19 U.S.C. 2504(a) ("No provision of any trade agreement * * * which is in conflict with any statute of the United States shall be given effect."). But there is no such conflict.

GATT directs signatory countries not to impose duties on fairly valued imports. The agreement, however, does not specify how signatories must accomplish that result. The Department of Commerce achieves that goal in two ways. First, it excludes from its orders those companies that have no or only de minimis sales at less than fair value in the United States. Second, although all imports covered by the Department's and the Commission's findings become subject to an antidumping order, an importer may obtain an annual review by the Department of Commerce to determine whether individual transactions were made at less than fair value. Accordingly, sales at fair value will ultimately not be assessed an antidumping duty. 19 U.S.C. 1675(a) (1982 & Supp. V 1987); 19 C.F.R. 353.53. Particularly in light of its administration by the Department, therefore, the statute fully comports with the intent of the trade agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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